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statutes authorizing search warrants relative to the enforcement of their narcotics law. It is also possible, of course, that search warrants may be issued in other states to search for narcotics, if the state has a statute authorizing the issuance of warrants to search for property "used in the commission of a felony."

In order to help remove the doubt concerning the admissibility of evidence obtained without a search warrant in cases where no warrant may issue, and further, to aid the law enforcement officers of our State more effectively to enforce our laws in a legal manner, it is submitted that the search warrant statute, G. S. § 15-25,[23] should be amended to allow the issuance of search warrants for property used in the commission of a felony;[24] and that the Uniform Narcotics Act, G. S. § 90-110,[25] should be amended to allow the issuance of search warrants to search for narcotics being held or possessed in violation of the narcotics law of North Carolina.[26]

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Federal Tort Claims Act—Discretionary Functions Exception

On June 8, 1953, the Supreme Court of the United States, in *Dalehite* v. *United States*,[1] affirmed the judgment of the Court of Appeals for the 5th Circuit in the Texas City disaster cases.[2] The District Court for the Southern District of Texas had found for the plaintiffs, and that judgment had been reversed and rendered for the United States by the court of appeals. Leave to file a petition for rehearing was denied on November 9, 1953.[3]

[23] N. C. GEN. STAT. § 15-25 (1953).

[24] The Federal cases distinguish between evidence of the offense being carried on and the instruments or fruits of the crime. Thus searches of one's house, office, papers, or effects merely to get evidence to convict him of crime is considered a violation of the self-incrimination prohibition; but searches for and seizure of stolen property, counterfeit coins, burglar's tools, illicit liquor and gambling apparatus is considered proper under the Federal law. U. S. v. Lefkowitz, 285 U. S. 452 (1932).

[25] N. C. GEN. STAT. § 90-110 (1950).

[26] "The use of the search warrant to prevent and detect crime is a valid exercise of the police power of the state. The constitutional provisions have no application to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals, and welfare." 47 AM. JUR. *Searches and Seizures* § 13 (1938).

[1] 73 S. Ct. 956 (1953). Mr. Justice Reed delivered the prevailing opinion. Mr. Justice Clark and Mr. Justice Roberts took no part in the case. Mr. Justice Jackson submitted a dissenting opinion in which Mr. Justice Black and Mr. Justice Frankfurter concurred.

[2] *In re* Texas City Disaster Litigation, 197 F. 2nd 771 (5th Cir. 1952). Three of the six judges, while agreeing with the decision to reverse the judgment of the district court, dissented from the decision to render judgment for the United States, being of opinion that the facts alleged in the complaint set up grounds for relief and that the cause should have been remanded for a new trial.

[3] The litigants now, of course, attempt to secure remedy through special Congressional legislation.

A brief summary of the facts underlying this litigation may be useful.[4] Shortly after the close of the second World War, the government of the United States undertook or authorized the manufacture of a product known as fertilizer grade ammonium nitrate, commonly referred to as FGAN. Since ammonium nitrate was an important component of explosives used by the armed forces, it had been manufactured during the war at a number of government-operated ordnance plants. It was therefore arranged that FGAN should be made in some fifteen otherwise deactivated ordnance factories. The project was to be carried out largely by private concerns, but they were to use government-approved formulae and to be under the direct control of the government as to plans and schedules of production, packaging, storage and shipping. Army personnel were assigned to supervise and direct the entire operation in all its details.

The FGAN thus made was mainly designed for shipment abroad for use in aiding in the agricultural rehabilitation of the occupied countries. As part of this program a considerable quantity of FGAN had been stored in Texas City where it was available for loading on ships sailing from that port. In April, 1947, two ships, the *Grandcamp* and the *High Flyer,* berthed in the harbor of Texas City, were being loaded with FGAN. On the morning of April 16 fire was discovered in the hold of the *Grandcamp,* and shortly thereafter the cargo of FGAN exploded with such terrific violence that hundreds of the residents of Texas City were killed, and millions of dollars of property damage caused. The fire spread to the *High Flyer* and subsequently that ship exploded also, with further loss of life and property damage.

As a result of this disaster, almost 8,500 plaintiffs were assembled with aggregate claims against the United States approximating $200,000,000. The alleged rights of all claimants were grounded on the Federal Tort Claims Act,[5] and it was agreed that the validity of the rights of all should be tested in the case of *Dalehite* v. *United States,* here under discussion. If there was judgment for the plaintiff in that case, the only question in the other cases would be the amount of damages to be assessed in each instance; if judgment was rendered for the United States, all the other complaints would be dismissed.

In arriving at its determination that the judgment of the court of appeals in favor of the United States had been correct, the Supreme

[4] The proceedings in the district court and the court of appeals are ably reviewed, with pertinent comment, in 101 U. OF PA. L. REV. 420-425 (December, 1952). It is, therefore, unnecessary to restate at length the contentions of the parties or the opinions of the judges in the lower courts.

[5] 28 U. S. C. §§ 1346, 2671-2678, 2680 (1950). The legal background, legislative history and judicial interpretation (to 1948) of the Act are discussed in a comprehensive review in 26 N. C. L. REV. 119-138 (1948). See also 56 YALE L. J. 534 (1947).

Court considered two questions: first, were the situations antecedent to and leading up to the disaster covered affirmatively by the provisions of the Act; and second, did one or more of the exceptions set forth in the Act exempt the United States from liability under the circumstances.

The Court disposed of the contentions of the plaintiff on the first question by reference to the provision of the Act conferring upon the district courts "exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death *caused by the negligent or wrongful act or omission* of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[6] (Emphasis provided.) It was pointed out that the plaintiff did not allege negligent or wrongful acts on the part of specified or named employees, which the wording of the Act, in the view of the Court, required.[7] Plaintiff's theory that the government should be held strictly liable, in view of the allegation that it was, in effect, engaged in an inherently hazardous enterprise, was rejected on the ground that the Act requires proof of misfeasance or nonfeasance, thus excluding liability without fault.

However, the critical determination of the Court dealt with the provisions of the Act defining situations in which the Act shall not apply. In this case the most important such exception is the one relating to discretionary acts worded to exclude any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused."[8] No serious question arose as to the power of the appropriate responsible administrative officers to make the initial decision to manufacture FGAN, nor was it contended that that decision, as such, involved the United States in liability, either under the terms of the Tort Claims Act or under the general principles of administrative law.[9] The important questions

[6] 28 U. S. C. § 1346 (1950).

[7] The Court of Appeals for the 3rd Circuit, in Jackson v. United States, 196 F. 2d 725 (1952), held that the Act applied even where negligence was not proved as to a specific employee, since the government can act only through the agency of some employee. Therefore, if the government is negligent, it must be by reason of the negligence of some person. Also, in State of Maryland for the use of Pumphrey v. Manor Real Estate and Trust Co., *et al.*, 176 F. 2d 414 (4th Cir. 1949), the government was held liable without the finding of negligence on the part of a specific employee. (This case is discussed further, *infra*, p. 124.) There are other cases that seem to apply the rule of general negligence, *i.e.*, United States v. Hull, 195 F. 2d 64 (1st Cir. 1952), Phillips v. United States, 102 F. Supp. 943 (E. D. Tenn. 1952), Blaine v. United States, 102 F. Supp. 161 (E. D. Tenn. 1951), and Henson v. United States, 88 F. Supp. 148 (E. D. Mo. 1949).

[8] 28 U. S. C. § 2680(a) (1950).

[9] For a discussion of the legal meanings and implications of discretionary as distinguished from non-discretionary or ministerial acts, see Freund, *Administra-*

related to the exempt character of the decisions and actions of employees in the lower echelons of authority. On this point the Court said: "Where there is room for policy judgment there is discretion. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion."

Hence the Court found that all the acts complained of by the plaintiff—alleged failure to complete investigations initiated to determine possible dangerous characteristics of FGAN, alleged negligent packaging of a combustible product in combustible containers at high temperatures, alleged failure to label the packages so as to give notice of the unstable, highly combustible and potentially explosive nature of the contents, and the alleged failure to warn handlers of the dangers of careless stowage—were all discretionary, at one level of responsibility or another, and, hence, not actionable under the provisions of the Act.

It is possible at this point to entertain the conclusion that the Court has significantly modified the general attitude of federal courts in interpreting the Tort Claims Act. By and large, the opinions of the courts in applying the law have tended in the direction of liberality. It is true that it has been authoritatively determined that members of the armed services, while on active duty, may not sue the government under the Act.[10] But it has been held that military personnel may recover if on

tive Powers over Persons and Property (1928) cc. V and VI. The general rule that discretionary administrative acts are not subject to judicial review or interference is too well established and too clearly understood to require extensive supporting citation. The rule has been applied in a number of cases arising under the Tort Claims Act. The following classes of cases will serve as examples:
a. Injuries and damage resulting without negligence from the execution of plans for public works or public improvements: Coates v. United States, 181 F. 2d 816 (8th Cir. 1950), Harris v. United States, 106 F. Supp. 298 (E. D. Okla. 1952), Lauterbach v. United States, 95 F. Supp. 479 (W. D. Wash. 1951), Boyce v. United States, 93 F. Supp. 866 (S. D. Iowa 1950), Olson v. United States, 93 F. Supp. 150 (D. N. D. 1950), and Pacific National Fire Ins. Co. v. Tennessee Valley Authority, 89 F. Supp. 978 (W. D. Va. 1950).
b. Damage resulting from alleged wrongful official acts and decisions of members of the Securities Exchange Commission: Schmidt v. United States, 198 F. 2d 32 (7th Cir. 1952).
c. Damage resulting from fall of experimental tree maintained by the Department of Agriculture for research purposes: Toledo v. United States, 95 F. Supp. 838 (D. Puerto Rico 1951).

[10] 28 U. S. C. § 2680(j) (1950) specifically exempts "Any claim arising out of *the combatant activities* of the military or naval forces, or the Coast Guard, *during time of war.*" (Emphasis provided.) In Feres v. United States, 340 U. S. 135 (1950), the Supreme Court held that neither servicemen nor their personal representatives could sue under the Tort Claims Act for injuries or death caused by accidents occurring in non-combatant activities in time of peace. The reasoning was that the Court would not presume either that Congress intended to modify the traditional relationship between the government and the members of the armed forces, or that Congress intended to provide service personnel with redress other than that available through the normal pension and compensation provisions of existing law. Here the Court affirmed what had become the prevailing rule in the lower courts.

furlough,[11] or if on liberty, even though still on the military reservation.[12]

In a number of cases civilians have been awarded damages for injuries resulting from negligent acts of military personnel, and in some such cases the courts have insisted that the circumstances fit both descriptive phrases in the section, namely, that the injuries arise out of "combatant activities" *and* "during time of war."[13] Neither has it been true that the rule has been restricted to the torts of members of the noncommissioned ranks. The government has been found liable for the negligence of commissioned officers, although under the definition of discretion in the Dalehite case the officers might have been found to be acting in a discretionary capacity.[14]

The United States has not been held liable for injuries to the wife of a soldier resulting from the refusal of the authorities of a military hospital to admit such person to care,[15] but in another case it was decided that after a person in similar circumstances had actually been admitted responsible hospital employees would be held to a standard of reasonable care.[16] Here again, the acts complained of could have been held to be discretionary by a strict construction of the word.[17]

[11] Brooks v. United States, 337 U. S. 49 (1949).

[12] Brown v. United States, 99 F. Supp. 685 (S. D. W. Va. 1951).

[13] See note 10, *supra.* In Skeels v. United States, 72 F. Supp. 372 (W. D. La. 1947), it was held that target practice by army airplanes during the war was not a combatant activity and that a civilian injured as a result of such practice could sue. (This case is cited with comment in 26 N. C. L. Rev. 119 (1948); see note 6, *supra.*)

And in Johnson v. United States, 170 F. 2d 767 (9th Cir. 1948), it was held that damage resulting from the discharge of oil and other noxious substances from naval vessels anchored in Discovery Bay in 1946 was damage arising from noncombatant activities, and that it was therefore unnecessary to consider the question as to whether or not a state of war still existed at that time.

[14] United States v. Gaidys, 194 F. 2d 762 (10th Cir. 1952), United States v. Kesinger, 190 F. 2d 529 (10th Cir. 1951), Parcell v. United States, 104 F. Supp. 110 (S. D. W. Va. 1951), Moran v. United Sates, 102 F. Supp. 275 (D. Conn. 1951), Brouse v. United States, 83 F. Supp. 373 (N. D. Ohio 1949), and Beasley v. United States, 81 F. Supp. 518 (E. D. S. C. 1948).

[15] Denny v. United States, 171 F. 2d 365 (5th Cir. 1948).

[16] Costley v. United States, 181 F. 2d 723 (5th Cir. 1950).

[17] It must, of course, be recognized that at least in theory the rule of strict construction is applied to any statute modifying the sovereign immunity of the federal government from suit by private parties. As to suits on contracts, the rule was restated in United States v. Sherwood, 312 U. S. 584 (1941). In recent years, however, there have been occasional signs of judicial restiveness. Thus, in Portland Trust & Savings Bank v. United States, 24 F. Supp. 953 (D. Ore. 1938), the court voices the precaution that the rule should not be used "to violate an obvious purpose of Congress by a too rigid application of that canon of construction." Again, in Wallace v. United States, 142 F. 2d 240 (2d Cir. 1944), Judge Frank reveals a strong conviction that the rule that "The King can do no wrong" is repugnant to the spirit of a democracy. He applies the rule with obvious reluctance. Finally, in Herren v. Farm Security Administration, 153 F. 2d 76 (8th Cir. 1946), the court says that the rule of strict construction "is not entitled to be made a judicial vise to squeeze the natural and obvious import out of such a statute or to sap its language of its normal and sound legal meaning."

In construing the Tort Claims Act the rule was applied without qualification in the following cases: Cropper v. United States, 81 F. Supp. 81 (N. D. Fla. 1948),

Almost from the beginning, and with the approval of the Supreme Court, the courts have been willing to hold that insurers and others with similar interests might be subrogated to the rights of injured persons, although there is nothing in the Act which specifically authorizes such subrogation.[18] In *St. Louis-San Francisco Ry.* v. *United States*[19] the main issue was the right of plaintiff to be subrogated to the rights of its employees. However, the facts are interesting in connection with the question under discussion. A number of railway employees had been injured while handling certain defective military bombs which had been consigned to the railway by the government for shipment. The issue of liability was not directly before the court of appeals, but in reversing the decision of the district court on the question of subrogation and remanding the cause for a new trial, the court clearly intimated that in its opinion the plaintiff had a good cause of action.

Two cases deserve special mention as indicating the favorable attitude heretofore taken by the courts toward claimants under the Tort Claims Act, both on the issue of negligence and on the definition of discretion. The first is the case of *Lemaire* v. *United States*[20] in which the complaint alleged that a well drilled by the government had, by reason of its depth and proximity, drained a water supply upon which plaintiff depended, and that as a result the value of her land had been adversely affected.

Donovan v. McKenna, 80 F. Supp. 690 (D. Mass. 1948), and Long v. United States, 78 F. Supp. 35 (S. D. Cal. 1948). But in Bates v. United States, 76 F. Supp. 57 (D. Neb. 1948), the court, after stating the rule, says nevertheless that the Act "should receive that construction consistent, of course, with its terms, which will accord with a fair appraisal of its purposes, and within constitutional limitations, effectuate them." In the following instances the courts have been outspoken in opposition to the rule of strict construction: Employers' Fire Ins. Co. v. United States, 167 F. 2d 655 (9th Cir. 1948), and United States v. Rosati, 97 F. Supp. 747 (D. N. J. 1951). The Supreme Court has indicated a favorable attitude toward a liberal view in United States v. Yellow Cab Co., 340 U. S. 543 (1951). In that case, in discussing the purpose of the Tort Claims Act as indicated by Congressional hearings and discussions, and the history of legislation waiving the government's immunity from suit, the Court says: "Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit, it is inconsistent to whittle it down by refinements."

[18] This question was settled by the Supreme Court in United States v. Aetna Casualty and Surety Co., 338 U. S. 366 (1949), when on certiorari to the appropriate courts of appeals four cases involving the rights of insurers to be subrogated to the rights of plaintiffs under the Act were decided against the government and in favor of the insurers. It is interesting to note the conclusion of the late Chief Justice Vinson's opinion, in which he quotes with approval Judge Cardozo's statement in Anderson v. Hayes Construction Co., 243 N. Y. 140, 147, 153 N. E. 28, 29-30 (1926): "The exemption of the sovereign from suit is hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

The Supreme Court of North Carolina, in Lyon & Sons v. Board of Education, 238 N. C. 34, 76 S. E. 2d 553 (1953), concurred in the liberal rule of construction followed by the federal courts, and held that the state tort claims act granted, by implication, the right of subrogation.

[19] 187 F. 2d 925 (5th Cir. 1951).

[20] 76 F. Supp. 498 (D. Mass. 1948).

There was no allegation of negligence on the part of any federal employee. The court held that a good cause of action had been made out.

The second is the case of *State of Maryland for the use of Pumphrey* v. *Manor Real Estate & Trust Co., et al.*[21] One of the unnamed defendants was the United States, and the complaint against the United States was the one entertained and discussed by the court. The Federal Housing Authority had rented a number of old semi-detached houses in the city of Baltimore and had converted them into apartments for the accommodation of war workers. Six families were sheltered in each house, all of them using the basement in common, among other purposes for the disposition of garbage and waste. The floors of the basements were of old and rotting wood. As the result of the combination of plentiful food and ideal facilities for nests and runways, the basements became heavily infested with active, fearless and well-fed rats. The condition was noted by the health authorities of the city of Baltimore, who called it to the attention of the Housing Authority. The Health Department issued no order and the Housing Authority took no action. In October, 1946, several months after the remodelling had been completed, two cases of typhus fever developed in the housing project. The United States Health Service, after an investigation, established to their satisfaction that the cases of typhus had been caused by the bites of infected fleas that had, in turn, been infected by the rats. The Health Service issued orders that the dens and runways of the rats be sealed off and that the vermin be denied further means of access to the buildings from the outside. The Housing Authority delegated the duty of carrying out this order to the private agency that had been hired to manage the houses. There was evidence that the work had been negligently done, but there was no evidence fixing negligence upon any particular federal employee or employees. In January, 1947, after the order just referred to had been issued, plaintiff's husband came down with typhus fever and died before the end of the month. The government cited § 2680(a) of the Tort Claims Act in defense, but the court rejected the contention of protective discretion. It was held that after the admittedly discretionary decision to take over the houses had been arrived at, the government was charged with the duty of keeping the premises safe for the tenants, and that its failure to do so made it liable under the Act.[22]

In the light of these cases, it is suggested that the Supreme Court has brought to an abrupt stop an observable tendency on the part of the

[21] 176 F. 2d 414 (4th Cir. 1949).

[22] For similar conclusions as to the meaning of § 2680(a), see the following cases: Somerset Seafood Co. v. United States, 193 F. 2d 631 (4th Cir. 1951), United States v. South Carolina Highway Department, 171 F. 2d 893 (4th Cir. 1948), Dishman v. United States, 93 F. Supp. 567 (D. Md. 1950), and Hodges v. United States, 98 F. Supp. 281 (S. D. Iowa 1948).

lower courts to apply the Tort Claims Act in a broad and liberal spirit. The rule laid down in *Dalehite* v. *United States* would certainly have reversed a number of the cases cited *supra*. However, there is perhaps no reason to assume that the rule in the *Dalehite* case will be carried to its ultimate, and logical, conclusion, namely, that the negligence of any federal employee, however humble, and including truck drivers, will be held to be exempt as a matter of discretion if the employee is acting under the orders or supervision of responsible superiors who have laid down a plan for the performance of his duties, but who, in the process, has decisions of his own to make.

Of course, in all such matters, practical considerations cannot be entirely ignored. Two hundred million dollars is a large sum of money, by any measure, and as a penalty for negligence it is unquestionably immense. There is nothing to indicate that this aspect of the situation influenced the Court, unless, translating freely, one might read such an intimation into the closing words of Mr. Justice Jackson's dissenting opinion: "Surely a statute so long debated was meant to embrace more than traffic accidents.[23] If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.'"

MILTON E. LOOMIS

Privacy—Unauthorized Use of Photographs—Infringement of Personal and Property Rights

In a recent New York case, *Haelan Laboratories, Inc.* v. *Topps*,[1] plaintiff manufacturer had contracts with certain major-league ballplayers for the exclusive right to exploit the publicity value of their photographs in advertising its products. Defendant subsequently used the photographs of these same ballplayers in a competing merchandising and advertising scheme.[2] In an action to secure damages and to enjoin

[23] The reference here is to the stress laid in the prevailing opinion upon the preliminary hearings and debates in Congress, where the proposed legislation was described as relating to "common law" or "run-of-the-mine" torts, and where almost the only illustration offered was that of the motor vehicle accident.

[1] 202 F. 2d 866 (2d Cir. 1953). Plaintiff had for several years been successfully merchandising and advertising its bubble gum by using pictures of big-league ballplayers, which it obtained by exclusive contracts. Defendant, a competitor, attempted to use pictures of players under contract with plaintiff. Held, plaintiff has a cause of action for this infringement.

[2] This use of a photograph is to be distinguished from "indorsement" or "testimontal" advertising. One who falsely claims an indorsement may subject himself to sec. 43(a) of the Lanham Act where a wrongdoer in cases of false advertising is "liable to a civil action . . . by any person who believes that he is likely to be damaged by the use of any such false description or representation." 60 STAT. 441, 15 U. S. C. § 1125(a) (1946). See CALLMAN, UNFAIR COMPETITION AND TRADE MARKS, § 20.2(f) (2d ed. 1950); Callman, *False Advertising as a Competitive Tort*, 48 COL. L. REV. 876, 885 (1948).